

State Water Board Responses to Key Questions**Group #1 Goal/Intent –Definition rules****May 2, 2008**

Key question number	FPR Rule Sec.	Key Questions	State Water Board Responses
4	§895.1	How do definitions, specifically the "watersheds with threatened or impaired values" definition, appropriately reflect relationship between TMDL impairment listings and CESA listing?(ref: L12-1)	<p>The definition of "watersheds with threatened or impaired values" is an unintentional artifact that only partially addresses the CWA 303(d) restoration goal. In 1999, two important documents were released nearly simultaneously: i) the report of the Scientific Review Panel on the adequacy of the Forest Practice Rules (FPRs) in protecting anadromous salmonids that had been listed (or were candidate species) pursuant to the State and/or Federal Endangered Species Acts (ESAs) and ii) the recommendation of the State and Regional Water Boards to better ensure that the FPRs would achieve conformance with water quality goals and requirements.</p> <p>The T/I Rule development process was started to try to ensure that the FPRs could: i) be approved by the National Marine Fisheries Service as satisfying the requirements for a Habitat Conservation Plan (HCP) and ii) continue to be certified by the State Water Board as best management practices and to achieve conformance with CWA 303(d) goals and requirements. As rule development proceeded, the California Department of Forestry and Fire Protection (Cal Fire) decided to oppose addressing CWA 303(d) issues in the T/I rules, so that matter was effectively excluded from further development, but the term "impaired" was never eliminated from the definition.</p> <p>Legally, the ESA listing of anadromous salmonids and CWA 303(d) listing of water bodies are largely unrelated, being done under separate legal requirements and having differing environmental goals. The ESAs' goals are to <u>conserve</u> listed species and their habitats, but the more rigorous CWA 303(d) goal is to <u>actively restore</u> impaired water quality and aquatic habitats for such species. The nexus is that aquatic habitat for ESA-listed species is one of the designated beneficial uses of water, over which the Water Boards have regulatory responsibility.</p> <p>This definition addresses restoring populations of ESA-listed anadromous salmonids to their previous ranges, but it does not address recovering populations that are impaired within their existing range.</p> <p>The defined term should be changed to reflect whatever decision BOF makes regarding achieving conformance with water quality and/or ESA goals and requirements.</p>

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6	§895.1	Does the "watersheds with threatened or impaired values" definition reflect geographic scope consistent with your agency's laws and policies?	Under this definition, T/I rules do not apply upstream of any blockage to migration of anadromous salmonids. Therefore, T/I rules need not be applied to prevent or reduce discharge of pollutants (e.g., sediment, heat) that can easily be transported downstream past obstructions into waters providing habitat for ESA-listed anadromous salmonids. This result would violate water quality goals and requirements protecting already-impaired habitats of ESA-listed salmonids from impacts of further pollution and would necessitate independent Water Board regulation of the upstream activity.
10	§916 [936, 956]	Is term "providing equal consideration" as a goal for beneficial use protection consistent with the Forest Practice Act? (ref L5-2)	<p>Giving another resource value "equal consideration" with timber production is consistent with the FPA. The FPA only speaks of "giving consideration" to other forest resource values, including watershed and fisheries protection (PRC §4512 (c); §4513 (b)). Nowhere does it specify whether that consideration should have lesser, equal or greater weight than the goal (not mandate) of maximum sustained production.</p> <p>This leaves BOF free to make those decisions. FPR §913.11 recognizes that maximum sustained production may be constrained by consideration of other forest values.</p> <p>Water Boards do not believe that the maximum sustained timber production goal (not mandate) represents, or was intended to be, the over-riding priority in all situations. Rather, they believe that the 303(d) listing of a water body and/or the ESA listing of a species establishes a critical need to elevate the goal of restoring or conserving the listed entity above the goal of maximizing sustained timber production.</p>
11	§916 [936, 956]	Is term "potentially significant adverse" consistent with definition on page 16 of the FPR? (ref L5-2)	<p>The §895.1 definition of "significant adverse impact" includes "a potentially substantial adverse change", so perhaps the term "potentially significant adverse" is redundant. It is not, however, inconsistent with the definition. Potential impacts and actual impacts are both to be considered to be significant.</p> <p>Only a Water Board, not BOF or Cal Fire, can decide whether allowing some reduction of water quality is justified, even if the latter might deem it to be insignificant under CEQA.</p>

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12	§916 [936, 956]	Should term at "native aquatic and riparian species" be defined for clarity of intent and if so, what should the definition be? What is the legal, policy, or science basis for this? (L6-5)	<p>The term "native" excludes extending unwarranted protection to invasive or noxious non-native species.</p> <p>In common definition, the term "aquatic species" means one that lives in or on water.</p> <p>A "riparian species" would one that lives largely within (or depends for a part of its life cycle on) a zone having riparian characteristics.</p> <p>The term "riparian" is defined in §895.1. A riparian <u>zone</u> is defined in several ways, depending on the scientific subject under consideration. It is not defined in the FPRs, but following the logic of the FPR definition, it would be a zone having the characteristics set forth in the definition. Science widely recognizes that riparian zones have a wide variety of unique and/or beneficial ecological functions, and so warrant increased protection.</p>
13	§916 [936, 956]	Is the term "feasible measures", as used in the Forest Practice Rules, consistent with the phrase "maintain where they're in good condition, protect where they are threatened and insofar as feasible, restore where they are impaired"? Does the term threatened and impaired mean dictionary or legal definition? What is the legal, policy, or science basis for this? (ref L6-6)	<p>"Feasibility" as defined in §895.1, is a concept imported from the California Environmental Quality (CEQA) Guidelines. "Feasibility" does not have the same priority in the State Water Code (WC) or in the federal CWA as it does in CEQA. Under those statutes, an individual discharger must comply with water quality requirements, regardless of the "feasibility" of doing so. If one can't comply, don't do the project. Only a Water Board, not BOF/Cal Fire, can decide whether allowing some reduction of water quality is justified, even if the latter might deem it to be insignificant under CEQA.</p> <p>The goal for impaired CWA (303(d)-listed waters is even more rigorous: to actively contribute toward recovery of the impaired quality and beneficial uses of water by doing <u>whatever is necessary</u>. Here, feasibility is not a legal consideration, although it may be a practical one. Water Board policy requires consideration of the possible mechanisms for reducing pollution to avoid TMDL allocation schemes that are more costly than needed or are unnecessary.</p> <p>Thus, the idea that restoration for impaired quality and beneficial uses of water need be done only "insofar as feasible" is not consistent with CWA 303(d) goals and requirements. To the degree that the FPRs do not adequately address restoration of impaired beneficial uses, the Water Boards must do so under their own authority.</p> <p>The term "threatened or impaired" is defined in FPR §895.1 See response in 4 above.</p>
14	§916 [936, 956] (b)(1)	Does the stated prohibition from discharge that could affect beneficial functions of riparian zones expand and be inconsistent with requirements under §916.3? From your agency's perspective, what is the legal, policy, or science basis for this? (ref L6-7)	In addition to the several values listed for protection in FPR §916.3, FPR §916 (b)(1) adds "beneficial functions of riparian zones". The lack of this value in FPR §916.3 is probably an inadvertent oversight, as FPR §916 (a)(1) clearly states the intent to protect, maintain and restore the beneficial functions of riparian zones (which are set forth in §895.1 definitions).

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15	§916 [936, 956] (b)(1) & (2)	Is the term or approach of using "deleterious quantities" consistent with all water board regulatory standards? Is use of this term an appropriate standard consistent with other agency laws and policies? Does the deleterious quantities approach applied to removal of water, trees or large woody debris from a riparian area meet all agency's policy and legal considerations? Does this standard expand upon what is legally required?(ref L6-7, L6-8, L6-10)	<p>While §916 [936, 956] (b)(1) expands upon what might be required under CEQA, the "quantities deleterious" standard is not consistent with Water Board goals and standards, and the approach is currently being rethought by Water Boards. It fails to address water quality goals in the following three situations:</p> <ol style="list-style-type: none"> 1. For 303(d)-listed waters, Water Boards would consider <u>any</u> additional anthropogenic discharges to be deleterious to already-impaired beneficial uses, and they would consider such a discharge to be a significant impact under CEQA. 2. The State anti-degradation policy (State Water Board Resolution #68-16) and the U. S. Environmental Protection Agency non-degradation policy (40 CFR § 131.12) require that, where water quality is higher than needed to support beneficial uses of water, that quality shall be maintained. Only a Water Board is authorized, under specified conditions, to allow any degradation of water quality; that is not within the purview of BOF or Cal Fire. 3. Even where beneficial uses are neither impaired nor of high quality, Water Boards would interpret "quantities deleterious" to mean quantities that are likely to cause (or have caused) a violation of water quality standards, whereas Cal Fire inspectors (many of whom are not familiar with water quality standards and their application) would probably interpret the term to mean amounts that wouldn't be likely to cause (or didn't cause) any problems obvious to them. <p>FPR §916 [936, 956] (b)(2) applies to areas where removal of water, trees and woody debris can impact beneficial uses and other resource values. The protection of riparian zones is not legally well-defined, but (for example) the causal relationship between reduced recruitment of large woody debris and water quality and aquatic habitat is well known. Forest water quality and aquatic habitat cannot be protected/restored without protecting (and restoring where needed) the beneficial functions of riparian zones</p> <p>The State Water Board is currently developing a water quality Policy for wetland and riparian areas. This Policy will have the effect of regulation and will be binding on BOF and Cal Fire (WC §13146).</p>
16	§916 (c)	Does the requirement for equal consideration as a management objective with respect to protecting and restoring native aquatic and riparian associated species and the beneficial functions of the riparian zone expand upon the equal consideration standard in §916 which is limited to beneficial use of water? Does this standard expand upon what is legally required? (ref L6-9, L6-10)	<p>FPR §916 sets forth an intent of general application, while FPR §916 [936, 956] (c) specifically addresses activities within a watercourse and lake protection zone (WLPZ), equipment exclusion zone (EEZ) or equipment limitation zone (ELZ). The FPR §916 [936, 956] (c) provisions do expand upon (but are not inconsistent with) the "equal consideration for beneficial uses of water" provisions in FPR §916, and they are consistent with the immediately following sentence of FPR §916.</p> <p>See response in 15 above.</p>

Key question number	FPR Rule Sec.	Key Questions	State Water Board Responses
17	§916.2 [936.2, 956.2]	Should application of protection measures (based on conditions of resource values) be expanded to appurtenant roads, including those roads outside of the watershed or outside of the THP boundary? From your agency's perspective, what is the legal, policy, or science basis for this? (ref L6-11)	<p>The protection measures should be applied to all logging roads in the road system or in a watershed. The use of the term "logging area" was meant to include appurtenant roads, not just roads within the THP boundary. Scientific studies have repeatedly found forest roads to be the major contributors to sediment discharges in the forest environment. Ideally, road systems, including appurtenant roads, would be dealt with on a system-wide or watershed basis, rather than on the current (and inadequate) THP-by-THP basis.</p> <p>The Scientific Review Panel found that 1999 FPRs were not adequate to protect ESA-listed anadromous salmonids, and that the major factors contributing to this inadequacy was an ineffective site-by-site approach to cumulative effects and the lack of a watershed approach. Despite several subsequent attempts, BOF has been unable to develop a suitable watershed approach. The road management plan rules would be a step in this direction.</p>
18	§916.2 [936.2, 956.2]	Should the term "potentially significant adverse impacts" be changed to "significant adverse impacts to the environment" for consistency with existing definitions in the FPRs? (Ref L6-12, L6-5). To what extent should the T/I rule language precisely use CEQA guideline terminology?	<p>See response in 11 above.</p> <p>The extent to which the T/I rule language should or should not follow CEQA guideline terminology, or continue to incorporate the protect/maintain/restore language, depends on BOF policy decisions regarding whether or to what degree to incorporate the more stringent goals, requirements and approaches for water quality or for threatened/endangered species. Both State (Porter-Cologne) and federal (CWA) water quality goals, approaches and requirements exceed CEQA goals, approaches and requirements. CEQA does not constrain the application of State and federal water quality and endangered species goals, processes or requirements.</p>

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19	§916.2 [936.2, 956.2]	What should be the basis for determining where values need to be restored? Is the term "where needed" too vague? Should language used in section 916 be used instead? From your agency's perspective, what is the legal, policy, or science basis for this? (ref L12-3)	<p>Restoration is needed wherever and whenever water quality standards are not met. The basis for determining where beneficial uses of water need to be restored is set forth in the "Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List" which identifies pertinent legal requirements from the Water Code and CWA.</p> <p>The FPR "where needed" language is vague. There are at least three different situations in which it might apply and be applied differently:</p> <ol style="list-style-type: none"> 1. A water body has not yet been listed per CWA 303(d), but it is headed in that direction: Proactive measures "are needed" to prevent it from deteriorating further and necessitating a listing. 2. A water body segment has been 303(d)-listed, but a TMDL implementation plan has not yet been promulgated: Proactive measures "are needed" in lieu of more stringent measures that might subsequently be required in a TMDL implementation plan. 3. A water body is covered by a TMDL implementation plan: The measures specified in this plan "are needed" (legally required) for regulatory compliance. <p>The policy issue before BOF is to decide which of these situations it wishes for the FPRs to address. To the degree that these situations are not addressed in the FPRs, the Water Boards must address them under their independent responsibility and authority, which will contribute to continued bifurcation in regulation of timber operations.</p>
20	§916.2 [936.2, 956.2]	Do requirements for achieving goals of restoration exceed CEQA requirements, functional certification, and Forest Practice Act? (ref L5-3)	Yes. See response in 18 above.
21	§916.2 [936.2, 956.2](a) (1)	Do protection measures for restorable quality of beneficial uses of water go beyond water quality control plan requirements for existing and potential beneficial uses? (ref L6-13)	No. Section 101 of the CWA (33 USCA 1251) states the national goal of eliminating the discharge of pollutants to navigable waters by 1985 and sets for the "interim goal" of achieving making all such waters fishable and swimmable by 1983. Further, pursuant to U.S. EPA regulations (40 CFR 131.3(e)), the goal of water quality control plans is to restore beneficial uses to the condition that existed as of November 28, 1975. Existing uses are those uses actually attained in the water body on or after that date. All basin plans are required by law to implement those requirements.

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22	§916.2 [936.2, 956.2](b)	Should the term "minimum protection measures" be replaced with term "standard protection measures"? Use of the term minimum implies rules can only be increased and not decreased. Is this consistent with board policies, Forest Practice Act and other agency laws and policies? (L6-15, L12-3a)	<p>At the time the "minimum protection measures" language was promulgated, there were few or no known instances where the standard protection measures were actually increased, and there were numerous examples of instances where they were decreased with inadequate justification. This language was deliberately chosen to prevent further abuse of the flexibility otherwise allowed in the FPRs.</p> <p>An alternative way to address the issue is for the FPRs to specify two different levels of explanation and justification: a less rigorous level for increasing the level of protection over that which the standard FPR practices would provide, and a more rigorous level for decreasing that level of protection. The required levels of explanation and justification could also be more rigorous where the affected water bodies were either 303(d)-listed or had ESA-listed species.</p>
24	§916.2 [936.2, 956.2](b)	Should the term "minimum protective measures" be deleted since the classifications are used to determine the appropriate protection measure, not just minimums? What is the legal or policy basis for your agency's perspective?(ref L12-3a)	See response to 22 above.
26	§916.9 [936.9, 956.9] (a)	This section establishes standards for conduct, including compliance with the sediment TMDLs, no measurable stream flow reduction during water drafting, protection of snags and down logs in riparian zone, and vegetative canopies for shading. Are these appropriate indicators of no significant impact to listed fisheries?	<p>Section 916.9 (a) is designed neither to achieve compliance with the CEQA goal (i.e., just don't cause a significant impact if you can feasibly avoid it) nor with the much more rigorous 303(d) goal (i.e., actively contribute to restoration), but with an intermediate goal (i.e., don't impede the natural rate of recovery).</p> <p>For the latter goal, the performance standards in this section are quite appropriate, and they reflect the major riparian functions identified by the TAC as subjects for scientific literature review. These are necessary objectives, but they may not be sufficient objectives.</p>
29	§916.9 [936.9, 956.9]	How should selection harvesting or other restoration practices promoting habitat conditions for non-salmonid species be considered? Should selection harvesting be permitted in riparian zones to improve habitat for other species? What is the legal, policy or science basis for your agency's perspective? (ref L4-6)	This question exposes a major deficiency in State government. There probably are situations in which some management within a riparian zone for non-salmonid species would be appropriate, even though that might pose some risk to salmonids. But there currently is no State-level guidance regarding the relative priority of the various (and sometimes conflicting) environmental and resource management mandates, goals, and requirements of the different agencies. This leaves each agency at risk of litigation should they choose to relax their requirements and accept some risk for the sake of some "greater good".

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30	§916.9 [936.9, 956.9]	Are the existing goals relevant to achieving conditions directly affected by forest regulation? To what extent should Forest Practice Rules contribute to larger agency goals of meeting the TMDL requirements or species recovery requirements? (ref L11-1)	<p>The FPR §916.9 goal is indeed relevant to forest management. It is basically a goal to avoid interference with the natural rate of recovery in watersheds with ESA-listed anadromous salmonids. This goal is not as rigorous as the CWA 303(d) goal of actively restoring aquatic habitat for ESA-listed species.</p> <p>A major policy issue before BOF is the degree to which the FPRs will incorporate the goals and mandates of other agencies. While the FPRs express the intent to be “consistent with other laws....including the Porter-Cologne Water Quality Act” (FPR §896(a)), they clearly do not achieve this objective, much less an objective of consistency with the CWA.</p> <ol style="list-style-type: none"> 1. The FPRs are largely based on CEQA goals which are much less rigorous than the ESA conservation goals for endangered species and the CWA 303(d) restoration goals for impaired beneficial uses of water. 2. FPR §896(a) states that “these rules are intended to provide the exclusive criteria for reviewing THPs”. This would currently preclude application of all other legal requirements, including those promulgated pursuant to CWA 303(d) and the ESAs. 3. FPR §1037 fails to authorize review team agencies to advise the CAL FIRE Director regarding potential non-compliance with their own legal requirements and their recommendations for how compliance could be achieved. <p>The major contributors to the increasing bifurcation of regulation of timber operations are probably:</p> <ol style="list-style-type: none"> 1. The lack of the FPRs’ incorporation of the legally applicable goals, mandates, and requirements of other agencies, and 2. The increasing difficulty other agencies face in getting their requirements met through the processes set forth in the FPRs.
32	§916.9 [936.9, 956.9] (a)(1)	In watersheds that do not have adopted TMDLs, must operations be planned so they do not result in any measurable sediment load increase to a watercourse or lake? If so, this standard is greater than for watercourses within adopted TMDLs, which permit a specified sediment load increase. What is the policy or legal basis for your agency's perspective on this? (ref L12-4)	<p>All watersheds are subject to the State anti-degradation policy (State Water Board Resolution #68-16) and the U.S. EPA non-degradation policy (40 CFR § 131.12). These policies require that, where water quality is higher than needed to support beneficial uses of water, that quality shall be maintained. Only a Water Board is authorized, under specified conditions, to allow any degradation of water quality; that is not within the purview of BOF or Cal Fire.</p> <p>All watersheds are subject to the water quality standards and prohibitions set forth in applicable basin plans approved by the State Water Board. Some sediment load increase could be allowable, but not enough to threaten to cause violation of these requirements. Again, only Water Boards are authorized to make this determination. In certain cases, revision of the water quality standards may be needed and appropriate.</p> <p>While Water Board could allocate some additional sediment load under certain conditions, all existing sediment TMDLs in forested land are designed to reduce sediment loads.</p>

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33	§916.9 [936.9, 956.9] (a)(1)	Should T/I rules in watersheds without a TMDL be consistent with 303(d) goals? What is the policy or legal basis for your agency's perspective on this? Because T/I goal is preventing deleterious interference and TMDL/303(d) requires restoration, T/I rules are not consistent w 303(d) goals. (ref L16-1)	To the first question: This is a BOF policy call; see response in 19 above. The T/I goal is not entirely consistent with 303(d) goal; see response in 30 above.
34	§916.9 [936.9, 956.9] (a)(1)	Should T/I rules be required to restore conditions and comply with adopted TMDLs? What is the legal basis for requiring restoration through the T/I rules? (ref L17-1)	This is a BOF policy call; see response in 19 above. FPR §916.9 (a)(1) requires compliance with an adopted TMDL. Pursuant to FPR §896, BOF must decide whether and to what degree it chooses for the FPRs to adequately address 303(d)/TMDL goals. Even if the T/I rules to not require restoration, BOF and Cal Fire must ensure compliance with any TMDL implementation plan in an approved Basin Plan (WC 13247). To the degree that 303(d) goals are not addressed in the FPRs, the Water Boards must address them under their independent responsibility and authority. This would contribute to continued bifurcation in regulation of timber operations.
36	Non-specific	Should a more site-specific approach be developed for rule requirement, as opposed to one-size-fits-all? What is the legal, policy, or science basis for your agency's perspective? (ref L3-2, L4-12, L5-1)	As strongly recommended in the 1999 Scientific Review Panel report, the greatest deficiency the FPRs have in protecting ESA-listed anadromous salmonids is the lack of an effective watershed approach to address cumulative effects. To address this deficiency, the North Coast Regional Water Board has promulgated watershed-wide general waste discharge requirements pursuant to WC 13263(i). An effective cumulative watershed effects approach would need to include all land and water uses, which is beyond BOF's regulatory reach. Also see response in 17 above and in 51 below.
38	Non-specific	Is there overlap with how definitions related to beneficial functions are linked to general policy considerations in §916 and §916.2.? What is the science, policy or legal basis for this? (ref L6-1)	Yes, there is overlap, by BOF intention. There should not a disconnect between policy and definitions.

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39	Non-specific	Should rules state that small contributions to pre -project cumulatively considerable adverse conditions be avoided, minimized or mitigated? What is the legal, policy, or science basis for your agency's perspective? (ref L7-5)	<p>After BOF decides which goals to adopt regarding ESA-listed anadromous salmonids and 303(d)-listed waters, it must then decide what approach to adopt for achieving those goals, including whether and how <u>pre-project</u> conditions should be addressed. CEQA only considers past <u>projects</u> in its limited evaluation of cumulative effects. It does not consider pre-project conditions due to past <u>natural events</u> or how these conditions are affecting the recovery of ESA-listed species. TMDLs must explicitly consider any natural sources of pollutant loading, as well as anthropogenic sources.</p> <p>In general, Water Boards perceive water bodies that are 303(d)-listed or support ESA-listed species to be suffering significant adverse cumulative effects and that any further exacerbation of the responsible factors is a significant cumulative effect to be avoided and reduced.</p>
40	Non-specific	Should a 303(d) listed waterbodies or CESA listed species elevate the goal of restoring the listed entity above the goal of maximizing sustainable timber production per the FPA? Should such listings require evidence from project proponent for clearly demonstrating contribution towards recovery or conserving the listed entity? What is the legal, policy, or science basis for your agency's perspective? (ref L16-2, L16-3)	<p>There is a lack of State-level guidance regarding the relative priority of conflicting resource management goals (See response in 29 above).</p> <p>In a general sense, Water Boards agree with the sustainable timber production policy; we would rather not see sustainably managed forest land converted to other uses. On the other hand, we do not believe that maximum timber production represents, or was intended to be, the over-riding priority in all situations. The FPA's general <u>goal</u> does not create a conflicting <u>mandate</u>.</p> <p>Water Boards believe that the 303(d) listing of a water body and/or the ESA listing of a species establishes a critical need to elevate the goal of restoring or conserving the listed entity above the goal of maximizing sustained timber production.</p> <p>Water Boards also believe that the 303(d) listing of a water body or the ESA listing of a species should change the burden of evidence compared to business-as-usual. A project proponent should become directly responsible for clearly demonstrating that the proposed project can be implemented in a manner which will contribute to recovering or conserving the listed entity.</p> <p>It seems logical that a valued resource that is threatened, endangered, or impaired should be given greater consideration than one that is not.</p>

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41	Non-specific	<p>What is the legal or policy basis for corrective or restoration actions being required on non-TMDLs water bodies which are approaching listings? Should separate corrective or restoration actions related to or separate from THP implementation be conducted by the BOF? (ref L16)</p>	<p>The CWA has no vehicle for addressing waters that have not yet been listed pursuant to 303(d), but a basin plan will state the target goals for each water body in terms of beneficial uses, and the anti-degradation policies come into play long before impairment is found. In general, all State agencies, board and departments must comply with basin plan requirements in conducting activities (including permitting) that affect water quality (WC §13247).</p> <p>There is also a pragmatic and regulatory basis for corrective/restorative measures on non-TMDL water bodies.</p> <ol style="list-style-type: none"> 1. If water body has not yet been listed per CWA 303(d), but it is headed in that direction, a proactive BOF/Cal Fire program to prevent it from deteriorating further could preclude the need for a listing, consistent with the FPR §916 [936, 956] intent to enhance beneficial uses. The program's requirements would likely be less stringent than those of a subsequent TMDL implementation plan. 2. A Water Board need not adopt a redundant TMDL program for a 303(d)-listed water body if: i) a solution to the impairment is being implemented by BOF/Cal Fire, and ii) the Water Board certifies that that solution will correct the impairment as well as a TMDL program (See Water Quality Control Policy for Addressing Impaired Waters.) This allows the landowners and BOF/Cal Fire much more control over their own destiny. Any such programs could be developed in collaboration with a Water Board pursuant to FPR §916.12. <p>BOF must decide what its policy will be; Water Boards cannot impose a decision on BOF.</p>
43	Non-specific	<p>What is the legal or policy basis for watershed restoration in 303(d) listed watersheds being on par or superseding maximum sustainable production mandates of the Forest Practice Act? (ref17-7)</p>	<p>In case of a conflict, the federal CWA requirements trump any lesser state requirements, including the FPA goal (not mandate) of maximum sustained production.</p> <p>WC §13146 and 13247 require that all state agencies, boards, and departments comply with approved water quality control policies and plans in conducting activities (including project permitting) that affect water quality.</p> <p>The first sentence of FPR §916 [936, 956] puts maintenance, enhancement, and restoration of beneficial uses on a par with maintenance, enhance, and restoration of the productivity of timberlands.</p> <p>See response in 40 above.</p>

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44	Non-specific	Do existing goals and intent sections of the T/I rules exceed Forest Practice Act, CEQA, or APA requirements? Specifically do the threat nor impaired rule goals exceed the "equal consideration" reference of the Forest Practice Act (ref 18-1, 18-2,18-4)	Yes, as they must if they are to achieve conformance with ESA conservation goals and/or with 303(d) restoration goals. There is no FPA reference to "equal consideration". See response in 10 above.
45	Non-specific	Do existing threatened or impaired goals exceed board policy (310.4) related to "due consideration" to other resource values or exceed Forest Practice Act under PRC 4512 (c) "giving consideration to the public's need for watershed protection"? (ref 18-6, 18-2,18-7, 18-8, 18-9)	The T/I goals certainly exceed the way in which the BOF policy and PRC 4512(c) have been understood and applied. However, they are consistent with the actual language as neither "due consideration" nor "giving consideration" specifies whether the weight given to that consideration should be more or less than that given to timber production. Eliminating or minimizing the T/I Rules will not reduce regulation of timber operations. It will just shift such regulation increasingly to other agencies with direct authority over fish and water quality.
46	Non-specific	CEQA functional certification guidelines require legislation for regulatory programs to authorize protection of the environment. Do other agency laws or policies that require more than protection of environment supersede CEQA guidelines? (ref 18-10)	Yes. The CEQA goals can be summarized as "just don't make things worse, if feasible". The CWA 303(d) goal is to <u>actively contribute toward restoration</u> of impaired beneficial uses of water; simply protecting against further impairment is not sufficient. As a federal law, this supersedes any State law. See response in 30 above. State Water Code specifically requires that, in carrying out activities that may affect water quality (such as permitting projects) all state offices, departments, and boards must comply with both state policy for water quality control and water quality control plans (WC 13146, 13247).
47	Non-specific	The Administrative Procedures Act requires regulations be adopted within the scope of authority prescribed by certain laws (the FPA for T/I rules). Are APA project impact mitigation requirements per GC 11340(d) exceeded by T/I rules? (ref 18-12 and 18.12a, 18-13, 18-14, 18-15, 18-16)	GC 11340 (d) sets forth no requirements, only a finding of the Legislature stating preference for performance standards that could reasonably be expected to produce the same result as prescriptive standards. Eliminating or minimizing the T/I Rules will not reduce regulation of timber operations. It will just shift such regulation increasingly to other agencies with direct authority over fish and water quality.

Key question number	FPR Rule Sec.	Key Questions	State Water Board Responses
48	Non-specific	The APA requires consideration of performance standards. Should performance standards be established to meet other agency goals beyond the Forest Practice Act?(ref 18-13, 18-14, 18-15, 18-16)	<p>Water quality standards are performance standards.</p> <p>FPR performance standards incorporating water quality goals could be very beneficial <u>but only if</u>:</p> <ol style="list-style-type: none"> 1. Water Boards can advise the Cal Fire Director regarding what measures are needed to achieve compliance with their requirements, and 2. The performance standards can be effectively and directly enforced by Cal Fire (which finds it difficult to enforce performance standards).
49	Non-specific	Does the achievement of other agency goals, such as implementing restoration requirements, exceed regulatory functional certification requirements, where a regulation shall not be approved or adopted if there are feasible alternatives or mitigations available (PRC21080.5).(ref L18-13, 18-14, 18-15, 18-16, 18-18)	<p>Yes. The requirements referenced apply <u>only</u> to programs to be certified as functionally equivalent under CEQA. They do not apply to programs created to address mandates of other State statutes (e.g., the Porter-Cologne Act).</p> <p>The 303(d) restoration goals and TMDL requirements are set by federal CWA requirements which supersede all less rigorous State statutes.</p> <p>The WC requires TMDL implementation plans be incorporated into Basin Plans, and all State agencies, boards and departments must conform with Basin Plans in conducting activities (including permitting) that affect water quality (WC 13247).</p> <p>However, both the Water Quality Control Policy for Addressing Impaired Waters and FPR 916.12 would allow BOF to create and implement program which could be used as an alternative to a TMDL implementation plan. See response in 41 above.</p>

Key question number	FPR Rule Sec.	Key Questions	State Water Board Responses
51	Non-specific	<p>What are the limiting factors regional water boards consider when adopting a TMDL? Did the water boards engage the BOF during the adoption and implementation of TMDLs strategies? (ref L18-21, 18-22)</p>	<p>CWA 303(d) and related U.S. EPA regulations speak in terms of stressors or pollutants, not in terms of limiting factors as used in the T/I rules. Stressors and pollutants are usually conceived in terms of too much of something in the water column (e.g., turbidity, suspended sediment, temperature, chemicals) rather than in terms of habitat. Sometimes, this misses the real problem (e.g., a lack of flow or of the large woody debris needed to create channel structure and aquatic habitat).</p> <p>For Water Boards, the primary factors considered under 303(d) are the beneficial uses that are impaired and the water quality objectives that are exceeded. They determine the acceptable load of the responsible pollutant and, per U.S. EPA guidelines, provide for a margin of safety and allow for seasonal variation in allocating the pollutant load among dischargers.</p> <p>The Water Boards have engaged BOF and Cal Fire through the normal public noticing and public participation opportunities. Cal Fire has usually participated in Water Board public workshops and hearings for TMDL implementation plans. The timberland owners in these watersheds are very much involved in the designation of the TMDLs.</p> <p>FPR 916.12 provides a process for active interagency/stakeholder collaboration in developing watershed-specific rules addressing 303(d)-listed waters. This could produce watershed-specific rules that can be used in lieu of separate TMDL implementation plan requirements. Despite numerous 303(d)-listings and TMDL implementation plans that have been adopted, Cal Fire and BOF have never implemented this FPR section.</p>